82-1637

NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JAMES L. STENDEBACH,
Petitioner

v.

CPC INTERNATIONAL INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GARY NORTON, Counsel of Record
GARY, THOMASSON, HALL & MARKS
Attorneys for Petitioner
P. O. Box 371
Corpus Christi, Texas 78403
(512) 884-1961

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTIONS PRESENTED FOR REVIEW

1. In deciding whether age was regarded as a negative factor in terminating Stendebach, do 29 U.S.C.A. § 623 (a)(2) and the U.S. Supreme Court's decisions in *Hazelwood School District v. United States,* 433 U.S. 299, 308, 97 S.Ct. 2736, 2742 (1977) and *Mayor v. Educational Equality League,* 415 U.S. 605, 620-621, 94 S.Ct. 1323, 1333 (1974), prescribe the legal standard for the relevant group of CPC's employees for comparative evaluation to be limited to employees who were actually compared by CPC as having comparable qualifications to perform work functions which Stendebach actually performed?

2. Is the U.S. Court of Appeals' opinion in error in failing to rule on Stendebach's Issues Nos. 3, 4 and 5 Presented for Review of Stendebach's objections that Defendant's Exhibits Nos. 1, 9 and 2 were inadmissible evidence because these Exhibits compared by age a broad group of all retained and salaried personnel including employees who were in different work classifications, such as clerical and administrative personnel, and thus were *not* within the relevant group actually compared by CPC as having comparable qualifications to perform the work functions which Stendebach was qualified to perform as a managerial supervisor and/or chemist in the production and technical divisions?

3. Is the U.S. Court of Appeals' holding that in reviewing a motion for instructed verdict, the U.S. District Court and U.S. Court of Appeals can evaluate the quality and weight of disputed evidence in conflict with the U.S. Supreme Court's decisions in *Wilkerson v. McCarthy,* 336 U.S. 53, 69 S.Ct. 413 (1949) and *Tennant v. Peoria & P. U. Ry. Co.,* 321 U.S. 29, 64 S.Ct. 409

(1944) which deny that a jury can evaluate the quality and weight of disputed evidence?

4. In deciding whether there is disputed evidence requiring submission of a question of fact to the jury, is the U.S. Court of Appeals' omitting from its opinion evidence that age was regarded as a negative factor in terminating Stendebach in error for the reason that the omissions of the evidence favorable to Stendebach in effect violate his rights to a jury trial and due process of law?

5. Is the U.S. Court of Appeals' opinion in error and contradictory in holding, on the one hand, that CPC's ad hoc evaluation committee's Job Evaluation and Selection Summaries (Defendant's Exhibits Nos. 7 and 8) were not hearsay because they were not offered to prove the truth, but, on the other hand, in holding in reliance on the contents of the Selections Summaries that the "final reduction-in-force, decisions were based exclusively on the scores received" as if "the fact of their content" were the truth in support of its conclusion of no age discrimination.

LIST OF PARTIES

All parties are named in the caption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

FEDERAL RULES OF EVIDENCE

FEDERAL RULES OF CIVIL PROCEDURE

NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JAMES L. STENDEBACH,
Petitioner

v.

CPC INTERNATIONAL INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

James L. Stendebach, plaintiff and petitioner (called "Stendebach"), respectfully petitions that a writ of certiorari be granted, that the U.S. District Court's Final Judgment granting a directed verdict for CPC International Inc., defendant and respondent (called "Corn Products" or "CPC"), and the U.S. Court of Appeals' opinion and judgment affirming the U.S. District Court, be reversed, and that this action be remanded for trial by jury.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit is reported at 691 F.2d 735 (5th Cir. 1982). (Appendix, pages 6a to 12a). The U.S. District Court's oral opinion is set forth in the Appendix, pages 1a to 4a, but was not otherwise reported.

JURISDICTION OF THIS COURT

The U.S. Court of Appeals' judgment was entered on November 15, 1982. (Appendix, page 6a) The U.S. Court of Appeals denied Stendebach's Petition for Rehearing on January 5, 1983. (Appendix, page 13a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE WHICH THE CASE INVOLVES

29 U.S.C. § 623(a)(1)&(2) provide:

(a) It shall be unlawful for an employer—

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age;"

* * *

STATEMENT OF THE CASE

This action is based on the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* CPC terminated Stendebach, who had worked as a chemist and as a managerial supervisor, when he was 47 years old, but CPC continued to employ other chemists and managerial supervisors who were less qualified and younger than Stendebach. The action was tried before a jury; but after Stendebach and CPC concluded their evidence, the U.S. District Court granted CPC's motion for directed verdict that Stendebach recover nothing.

Stendebach has a Bachelor of Science Degree in Chemistry. (R. 31/25-32/5) After graduating from college, Stendebach worked as a laboratory chemist for about ten years in the technical division of CPC's plant in Corpus Christi, Texas. (R. 32/8-33/15 & 34/5-7) After working as a chemist for about ten years, he was transferred and worked as a managerial division supervisor of the wet starch division in the plant's manufacturing or production division. (R. 32/17-33/7 & 34/8-20) As a managerial supervisor, Stendebach's work functions were to control and direct the people and processes under his supervisor, to control and contain costs in the functions under his direction, to maintain a safe working environment, and to represent management in these functions. (R. 34/21-35/4 & 346/16-24) A managerial supervisor's work is a people relation type of job, and the supervisor depends on people below him to take care of the details of the operations. (R. 36/2-5, 148/3-25 & 346/25-348/4) Stendebach supervised about 35 people on the first shift and a few more on the second and third shifts of the plant's operations. (R. 35/5-9) Although Stendebach was

a managerial supervisor in the wet starch division, he and other managerial supervisors were cross-trained in the refinery dry starch or finishing division in the plant's production division. (R. 36/11-22, 38/1-19, 129/20-25, 135/19-136/2, 350/10-351/7, 358/24-359/10, 413/10-15 & 483/7-9) On the second and third shifts, a single managerial supervisor supervised the wet starch division, the refinery dry starch division, the technical division and all other work functions at the plant. (R. 38/20-40/22, 131/16-133/2, 149/1-16, 155/12-157/24, 350/10-351/7 & 413/3-19) During their employment with CPC, Stendebach and other managerial supervisors continued their training at seminars with regard to management, budgeting, personnel development, pollution control and safety. (R. 40/23-41/11 & 136/10-19) During Stendebach's employment of nearly 23 years, CPC regularly evaluated Stendebach's performance; and after these evaluations, he was encouraged in his progress and received regular pay raises, including a last pay raise two weeks before his employment was terminated. (R. 55/15-56/7)

After Stendebach worked for CPC for nearly 23 years and became experienced and qualified in many of its operations, CPC terminated Stendebach's employment effective April 24, 1978 when he was 47 years old. (R. 47/4-14 & 48/13-16) Stendebach was terminated along with seven other managerial supervisors in the production division and five chemists and laboratory analysts in the technical division. (R. 54/8-57/5 & Plaintiff's Exhibit 4). These terminations were in connection with a reduction in forces at CPC's plant in Corpus Christi. However, when Stendebach was terminated, CPC continued to employ other managerial supervisors, chemists and laboratory

analysts who were less experienced, less qualified and younger than Stendebach in the production and technical divisions. (R. 56/8-57/5, Plaintiff's Exhibit 4, Defendant's Exhibit 9, 143/24-144/18 & 146/9-147/5)

In deciding who to terminate and who to retain in the production and technical divisions, CPC actually compared Stendebach only within a group of 27 employees who had comparable qualifications necessary to perform comparable work functions which Stendebach was qualified to perform in the production and technical divisions. CPC's terminations within the actually compared group of 27 employees had clear adverse effect on those in the protected age group who were 40 years of age or older in the production and technical divisions, as evidenced by the following summary:

	Employees Before Terminations		Employees After Terminations			
	No.	Percent	No.	Percent	Percent	(Decrease) or Increase
Protected Age Group, 40 to 70 years	19	70.4%	8	57.1%	(13.3%)	Decrease
Under 40 Years	8	29.6%	6	42.9%	13.3%	Increase
Total	27	100.0%	14	100.0%		

(R. 56/8-57/5, Plaintiff's Exhibit 4, Defendant's Exhibit 9, 143/24-144/18, & 146/9-147/5)

After Stendebach was terminated, CPC continued to employ managerial supervisors and a chemist who were under 40 years old and less experienced and less qualified than Stendebach, as follows:

1. R. Tompkins who was 35 years old with 10 years of service as a managerial supervisor;
2. W. Weber who was 37 years old with 9 years of service as a managerial supervisor;
3. D. Borrer who was 39 years old with 12 years of service as a managerial supervisor; and
4. D. Fuller who was 39 years old with 14 years of service as a chemist.

(R. 56/8-57/5, Plaintiff's Exhibit 4, Defendant's Exhibit 9) Stendebach helped train Tompkins, Weber and Borrer (R. 58/21-59/11). Stendebach knew and worked with Dale Fuller to some extent in the laboratory. (R. 62/9-19) With his 23 years of experience and qualifications in the technical and manufacturing divisions, Stendebach was more qualified than Tompkins, Weber and Borrer. (R. 60/21-61/12) Jesus Rodriguez, who was also a managerial supervisor and was 53 years old with 29 years of experience, concurred that Stendebach was as qualified or better qualified than Tompkins, Weber and Borrer as a managerial supervisor. Emigdio Besinaiz, who was an hourly union worker and worked under the supervision of Stendebach, Rodriguez, Tompkins, Weber and Borrer, also concurred that Stendebach and Rodriguez were more effective supervisors than Tompkins, Weber and Borrer. (R. 169/15-171/16 & 172/19-174/4) Even the plant manager, Bernard Kastory, concurred that Stendebach and Rodriguez were qualified to supervise the same work functions after their termination as they had supervised before their termination on April 24, 1978. (R. 430/13-431/22)

After the terminations on April 24, 1978, the refinery, which was about one-half of the plant's production division, was shut down. (R. 344/8-12 & 479/10-11) Except for the shutdown of the refinery and the addition of some automated equipment in the laboratory, all work functions remained the same after the terminations as before the terminations. (R. 344/23-345/9, 420/22-422/5, 422/23-423/15 & 479/12-15) In effect, except for work functions eliminated by the shutdown of the refinery and by the addition of some automated equipment in the laboratory, all of the remaining work functions were assigned to the fewer managerial supervisors after the terminations than before the terminations. (R. 344/15-23, 420/22-422/11 & 479/16-23)

When Stendebach was terminated along with the other managerial supervisors and laboratory personnel, the decisions about whom to terminate were supposed to be made in accordance with the Procedures for Reduction in Force which were initially submitted by R. C. Peterson's letter dated December 16, 1977 and supplemented by his letter dated January 19, 1978. (called "Termination Procedures") (Defendant's Exhibit 5) These Termination Procedures were not followed. Paragraph 3 clearly required that all employees be placed in rank order "*on a consistent basis*, i.e., the 'Summary Performance Review Form' for management . . . *as the primary tool* in developing rank order." The Termination Procedures obviously do not authorize considering information beyond CPC's business records and the personal knowledge of those participating in the decision-making process. The Termination Procedures clearly do not exclude consideration of age in the decision-making process. (R. 267/23-269/5) The Termination Procedures do not suggest that those

who were involved in the decision-making process should stray from the established procedures to evaluate the performance of employees; but to the contrary, the Termination Procedures explicitly require that established procedures for evaluation be followed in order to evaluate all employees on a consistent basis. (Defendant's Exhibit 5)

With regard to the circumstances existing before the Termination Procedures were prepared in December 1977 and January 1978, CPC had adopted new employee evaluation procedures in 1974 or 1975 by which the evaluation of an employee's performance was recorded on the Summary Performance Review Form. (R. 492/22-493/20) The purposes of the new evaluation procedures were to provide more uniform and objective evaluations for all management personnel, to permit the employee to participate in the evaluation so that he could improve his performance, and to have a continuing record of an employee's performance over a period of time. (R. 259/23-261/4, 477/20-478/9 & 487/10-19) One of the purposes for having uniform evaluations was to facilitate transfers. (R. 438/6-10) The criteria for evaluating personnel for transfers, which was a customary practice for CPC, were the same as for hiring and promotions. (R. 359/11-14 & 437/7-11)

Before the Termination Procedures were prepared, without excluding consideration of age in the decision-making process, the employees' ages had been already identified as an important factor to be considered in the evaluations in that somebody at headquarters told the plant manager, Bernard Kastory, that age ought to be part of the documentation in the evaluation process.

(R. 417/15-418/25) Charles Shoemate had been the plant manager of Corpus Christi from February 1974 until June 1976, and after then, he became CPC's vice-president of manufacturing at its headquarters. As vice-president, Shoemate was in charge of the plant in Corpus Christi. (R. 295/24-297/5) Shoemate started talking about reduction in forces with the plant manager in Corpus Christi before April 1977 and with CPC's management by early November 1977. (R. 280/11-23, 214/22-215/13 & 495/21-496/13)

During the period from April through early November 1977 and before the Termination Procedures were prepared in December 1977 and January 1978, while Shoemate was in Corpus Christi on October 29, 1977, he prepared his own handwritten list of employees, including their ages, years of service, grade and performance evaluations "directly off their latest performance appraisal rating. . . ." (R. 287/4-294/24) Shoemate also noted a symbol on his personal handwritten list for employees whom "Corn Products must keep." (R. 289/15-20 & Plaintiff's Exhibit 37) The plant manager, Kastory, admitted that he recalled discussing Shoemate's list dated October 29, 1977 that included age, numbers of years of service, performance appraisal, salary grade. (R. 31/23-434/15) R. C. Peterson, CPC's vice-president of personnel, recalls that the termination of management employees in Corpus Christi was first discussed in early November 1977 at a meeting of the staff which included the vice-president in charge of the Corpus Christi plant. (R. 495/21-496/13)

In preparation for the reduction in forces, the plant manager, Bernard Kastory, and the personnel manager,

Frank Cavanee, appointed an ad hoc evaluation committee to decide who should be terminated and who should be retained at the Corpus Christi plant. From the fall of 1977 through the terminations, Shoemate, CPC's vice-president for manufacturing, interacted regularly with the committee. (R. 245/2-247/19) In addition to the Termination Procedures, the ad hoc evaluation committee added additional criteria to evaluate the employees. (R. 357/19-358/1)

The ad hoc evaluation committee considered the employees' Employment Personnel Profile that included the employees' ages. (R. 417/4-14) Shoemate admitted that age is less likely to be considered if it were not disclosed and known than by its being disclosed and known (R. 271/1-11)

The ad hoc evaluation committee's consideration of the employees' Summary of Performance Review Form made up only a small part of the total review procedure, notwithstanding the Termination Procedures' requiring that the Form be used "*as the primary tool* in developing rank order." (R. 455/3-10 & Defendant's Exhibit 5) Among the six members of the committee, only one, Ray Frank, had ever evaluated Stendebach before they sat on the ad hoc evaluation committee. (R. 465/20-22, 488/3-8 & Plaintiff's Exhibit 1) The employees were not permitted to participate in the discussions of the ad hoc committee in order to assure that the committee considered complete information, contrary to the practice of permitting the employee's participation in the established evaluation procedures. (R. 257/16-258/1 & 424/23-425/7) The results of the ad hoc evaluation committee's discussions were compiled into Corn Products' Job Evaluation and

Selection Summaries. These Summaries were admitted into evidence, as Defendant's Exhibits Nos. 7 and 8, over Stendebach's objections that the Summaries were not based on personal knowledge and were hearsay and self-serving in that even if they were not admitted for the truth of the matter with regard to the qualifications of the employees, there was a higher probability that the information in the Summaries would be considered and weighed prejudicially against Stendebach than whatever value there may be in showing that the committee's development of the information was an operational fact. (R. 383/12-386/5, 393/16-394/14 & 397/21-398/16)

After CPC actually compared Stendebach only within a group of 27 employees who had comparable qualifications necessary to perform comparable work functions in the production and technical division, CPC created a new so-called comparable group of 76 employees, including 49 who were not actually compared to Stendebach in connection with the termination, as summarized in Defendant's Exhibits Nos. 1, 2 and 9. Defendant's Exhibits Nos. 1 and 9 are summaries which group chronologically by age all of the 76 terminated and retained salaried personnel, including clerical, administrative and other personnel who were not classified and qualified to work as managerial supervisors or chemists in the production or technical division at CPC's plant. Defendant's Exhibit No. 2 is a summary which compares by ages under 40 or over 40 all of the 76 terminated and retained salaried personnel, including clerical, administrative and other personnel who were not classified and qualified to work as managerial supervisors or chemists in the production or technical division at CPC's plant. These exhibits contain statistical data with regard to the ages and years of service of cler-

ical, administrative and other personnel who are obviously in work classifications that are clearly not comparable but differ substantially from the work classifications of managerial supervisors and chemists in the production and technical divisions. (R. 411/12-413/3-6 & 414/4-23) That these clerical, administrative and other personnel were not comparable and relevant is clearly proven by the fact that the ad hoc evaluation committee did not actually compare and evaluate them with managerial supervisors and chemists in the production and technical divisions. (Plaintiff's Exhibit 4 & Defendant's Exhibit 7) Nevertheless, Defendant's Exhibits 1, 9 and 2 were admitted into evidence over Stendebach's objection that the work classifications were not comparable, that there was no predicate to show that the other salaried personnel were in comparable work classifications, and that there was no predicate to show qualifications relevant to the work classification of supervisory management. (R. 399/5-410/22)

CPC later suggested that there is another so-called comparable group of 39 employees comprised of all employees in the production, technical and *mechanical* division. The 10 employees in the *mechanical* division were *not* included in the group which CPC actually compared in as having comparable qualification to perform comparable work function in the production and technical divisions. (Plaintiff's Exhibit 4 & Defendant's Exhibit 7) There were actually only 37 employees in the production, technical and *mechanical* division rather than 39 as stated by CPC and the U.S. Court of Appeals.

Stendebach's damages are stipulated if he prevails in this action. (R. 698-708)

JURISDICTION OF THE U. S. DISTRICT COURT

The U.S. District Court's jurisdiction is based on the Age Discrimination and Employment Act, 28 U.S.C. § 621, *et seq.*

REASONS FOR GRANTING THE WRIT

In holding that the relevant group for comparative evaluation for age discrimination was 76 employees, including 49 who were in different work classifications and who were not actually compared by CPC as having comparable qualifications to Stendebach, the U. S. Court of Appeals decided implicitly an important issue of first impression in apparent conflict with the legal standard for determining the relevant group for discrimination prescribed by 29 U.S.C. § 623(a)(2) and the U. S. Supreme Court's decisions in *Hazelwood School District v. United States*, 433 U.S. 299 (1977) and *Mayor v. Educational Equality League*, 415 U.S. 605 (1974).

In deciding who to terminate and who to retain in the production and technical divisions, CPC compared Stendebach only within a group of 27 employees who had comparable qualifications necessary to perform comparable work functions which Stendebach was qualified to perform in the production and technical divisions. However, without ruling on Stendebach's Issues Nos. 3, 4 and 5 Presented for Review, the District Court and the Court of Appeals chose to utilize a group of all 76 employees of the salaried work force for some comparisons and a group of 39 (actually 37) employees in the pro-

duction, technical and *mechanical* divisions, of which ten were in the *mechanical* division, for some comparisons. The District Court and the Court of Appeals have refused to narrow the focus to the 27 employees in the production and technical divisions against whom Stendebach competed and was actually measured by CPC based on comparable qualifications and comparable job functions in the production and technical divisions.

In determining the relevant group for comparison for the purpose of deciding whether a person has been the victim of unlawful discrimination, in *Mayor v. Educational Equality League*, 415 U.S. 605, 620-621, 94 S.Ct. 1323, 1333 (1974), the United States Supreme Court held that the relevant group for the purpose of evaluating statistical data is the group whose members are qualified to serve and not the population at large whose members are not qualified to serve.

In *Hazelwood School District v. United States*, 433 U. S. 299, 308, 97 S.Ct. 2736, 2742, n. 13 (1977), the United States Supreme Court stated:

> "When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."

The Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(2) provides that it shall be unlawful for an employer:

> "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age."

In interpreting 29 U.S.C. § 623(a)(2) in this case of first impression, the legal standard prescribing the relevant group for comparative evaluation in other discrimination cases should be followed in order to have a logically uniform and consistent legal standard for determining the relevant group for comparative evaluation in all discrimination cases. Thus, the relevant group for comparison of statistical data with regard to CPC's termination of Stendebach should be held to be limited to the 27 employees who were actually compared by CPC as having comparable qualifications necessary to perform comparable work functions in the production and/or technical divisions. Therefore, the U.S. District Court and the U.S. Court of Appeals should have ruled on Stendebach's Issues Nos. 3, 4 and 5 presented for review that Defendant's Exhibits 1, 2 and 9 which compared a group of 76 employees, including 49 who were not actually compared by CPC as having comparable qualifications, were not relevant and admissible to prove that age was not regarded as a negative factor in terminating Stendebach. Rules 401 & 402, Federal Rules of Civil Procedure.

In holding that in reviewing a Motion for Instructed Verdict, the U. S. District Court and the U. S. Court of Appeals can evaluate the quality and weight of disputed evidence, the U. S. Court of Appeals' decision is in conflict with the U. S. Supreme Court's decisions in *Wilkerson v. McCarthy*, 336 U.S. 53 (1949) and *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1944) and decisions of other U. S. Courts of Appeal.

In *Wilkerson v. McCarthy*, 336 U.S. 53, 57, 69 S.Ct. 413, 415 (1949), the United States Supreme Court held:

> It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given.

Accord, *Lavender v. Kurn,* 327 U.S. 645, 652-653, 66 S.Ct. 740, 744 (1946); *Tennant v. Peoria & P. U. Ry. Co.,* 321 U.S. 29, 35-36, 64 S.Ct. 409, 412-413 (1944); *Simblest v. Maynard,* 427 F.2d 1, 4 (2d Cir. 1970); *Chicago, Rock Island and Pacific Ry. Co. v. Howell,* 401 F.2d 752, 754 (10th Cir. 1968). But see *Boeing Company v. Shipman,* 411 F.2d 365, 374 (5th Cir. 1969).

With regard to the U.S. Court of Appeals' erroneous holdings that there was no evidence that Shoemate, the vice president from headquarters, was involved in the ad hoc committee's deliberations, directly or indirectly, that Shoemate's list was not prepared in conjunction with the preparation or implementation of reorganization plan, that the ad hoc evaluation committee was not influenced by Shoemate's list, that corporate management attempted to influence the members of the ad hoc evaluation committee and that age was not regarded as a negative factor, the U.S. Court of Appeals' opinion omits specific facts from which the reasonable inference can be drawn by a jury that age was regarded as a negative factor terminating Stendebach. The specific omitted facts include:

> (a) CPC continued to employ four managerial supervisors and other personnel who were under 40 years old and were less experienced and less qualified than Stendebach to perform the work functions in the production and technical divisions;

(b) Shoemate prepared his evaluation list of employees, including only their ages, years of service, grade and performance valuations "directly off their latest performance appraisal rating . . ." on October 29, 1977 which was during the period from April through early November, 1977 when he was discussing reduction in forces with the management of CPC, including discussion of the list with the plant manager, Kastory;

(c) The Termination Procedures were prepared in December, 1977 and January, 1978 and required evaluations on a consistent basis using the "Summary Performance Review Form" in order to provide uniform and objective evaluations;

(d) The Termination Procedures did not exclude the consideration of age as a negative factor; somebody at CPC's headquarters told the plant manager, Kastory, that age ought to be a part of the documentation in the evaluation process; and the ad hoc evaluation committee considered the employees' Employment Personnel Profile that included the employees' ages;

(e) Shoemate admitted that age is less likely to be considered if it were not disclosed and known than by its being disclosed and known;

(f) Shoemate interacted regularly with the ad hoc evaluation committee from the fall of 1977 through the terminations which period includes the time when he prepared his list before the Termination Procedures were prepared;

(g) In addition to the Termination Procedures which did not exclude the consideration of age, the

ad hoc evaluation committee added additional criteria to evaluate the employees and failed to follow completely and consistently the instructions of the Termination Procedures which required that the Summary Performance Review Form be used *"as the primary tool* in developing rank order" in order to evaluate employees on a consistent basis, as evidenced by the committee's considering the employees' Summary Performance Review Form as only a small part, rather than *"as the primary tool,"* of its review procedures; and

(h) Among the six members of the ad hoc evaluation committee, only one had ever evaluated Stendebach before then.

These omitted facts are sufficient to prove a prima facie case of age discrimination and to submit the disputed issues of fact to a jury. *Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981).

When these omitted facts are viewed along with CPC's terminations' adverse effect of reducing the protected age group by 13.3% within the relevant group, the inference clearly emerges that age was regarded as a negative factor. *Hedrick v. Hercules, Inc.*, 658 F.2d 1088, 1094 (5th Cir. 1981). See *Hazelwood School District v. United States*, 433 U.S. 299, 312, 97 S.Ct. 2736, 2743 (1977).

By disregarding the specific facts in the record and confirming the directed verdict against Stendebach, the U.S. Court of Appeals in effect has denied Stendebach a jury trial in conflict with the decisions by the U.S. Supreme Court and other U.S. Courts of Appeal cited above in this section. See Rule 38(a), Federal Rules of Civil Procedure.

Summaries prepared from information beyond the scope of personal knowledge and the business records of CPC for the purpose of creating an appearance to justify conduct in relation to anticipated claims are inadmissible hearsay and self-serving evidence.

The ad hoc evaluation committee's Job Evaluation and Selection Summaries, admitted into evidence as Defendant's Exhibits 7 and 8, are based on information beyond the personal knowledge of members of the committee and beyond the business records of CPC. The ad hoc evaluation committee failed to follow completely and consistently the instructions of the Termination Procedures which required that the Summary Performance and Review Form be used *"as the primary tool* in developing rank order" in order to evaluate employees on a consistent basis, as evidenced by the committee's considering employees' Summary Performance and Review Form only as a small part, rather than *"as the primary tool"* of its review procedure. Among the six members of the ad hoc evaluation committee only one had ever evaluated Stendebach before the termination procedure began. Source records were not produced in support of the Summaries, except for the employees' Summary Performance Review Forms which were admitted to be only a small part of the review by the committee. The employees were not permitted to participate in the discussion of the ad hoc committee in order to assure that the committee considered complete information. The Summaries were obviously based to a great extent on hearsay discussions among members of the committee and Shoemate who lacked personal knowledge. The Summaries are self-serving in that they were prepared to justify the conduct of CPC in anticipation of claims by

terminated employees; and thus, there was a higher probability that the information in the Summaries would be considered and weighed prejudicially against Stendebach than whatever value there may have been in showing that the committee's development of the information was an operational fact. Therefore, the ad hoc evaluation committee's Job Evaluation and Selection Summaries (Defendant's Exhibit No. 7 and 8) should not have been admitted into evidence because they were hearsay and self-serving Summaries; and the U.S. Court of Appeals should not have relied on the Summaries in holding that the "final reduction-in-force decisions were based exclusively on the scores received" in the Summaries as if the "fact of their contents" were the truth in contradiction to the Court of Appeals' also holding that the Summaries were not admitted to prove the truth. Federal Rules of Evidence 801, 802, 803, 804, 403 & 1006. See *Ralston Purina Company v. Hobson,* 554 F.2d 725 (5th Cir. 1977); *Bracey v. Herringa,* 466 F.2d 702 (7th Cir. 1972).

CONCLUSION

Petitioner respectfully submits and requests that his Petition for a Writ of Certiorari be granted, that the U.S. District Court's final judgment granting a directed verdict for CPC and the U.S. Court of Appeals' opinion and judgment affirming the U.S. District Court be reversed, and that this action be remanded for a jury trial.

GARY NORTON, Counsel of Record

GARY, THOMASSON, HALL & MARKS
Attorneys for Petitioner
P. O. Box 371
Corpus Christi, Texas 78403
(512) 884-1961

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C.A. NO. C-78-104

JAMES L. STENDEBACH

v.

CPC INTERNATIONAL INC.

UNITED STATES DISTRICT COURT'S ORAL OPINION DELIVERED UPON GRANTING DEFENDANT'S MOTION FOR INSTRUCTED VERDICT

THE COURT: Ladies and gentlemen, thank you for your patience. I'm sorry I am keeping you late. Let me say this to you. I have ended this case and I think you have sat through it patiently for two days and I think that whether you care to hear it or not, I owe you an explanation of why.

Basically, in the trial structure, there are two judges. I sit here as the judge of the law. I decide what evidence is relevant, what evidence has any bearing on what you are supposed to do, and then you decide, once you get the disputed evidence, you resolve it.

There is a procedure, however, for either side to make what is called a motion for a directed verdict, and that is a ruling that, as a matter of law, there is simply nothing for a jury to decide.

That motion has been made in this case by the Defendant, and I have granted it and let me explain to you why.

This is a case, as I said to you, that was filed under a federal law, the Age Discrimniation Act. Now, you have to understand the parameters of that act to understand what you were doing here. You see, it is not business of the federal government either the federal congress or the federal courts, to go into a private business and tell them how to run their business in general. It is not the business of the federal government to tell Corn Products or anybody else whether they must be efficient, they must run their plant a certain way, they must do this, they must do that, and we have heard so much about that, or how we all want the government off our back and so forth, but the only time the government can legislate in this area is discrimination. In other words, the government can legislate that you must not discriminate, based on race, sex, and religion, of course, and then they came along later with this one on age. This came after the early ones.

So that the issue here all along was not did they put money in their business or not, did they run their business properly or not, are they smart people, are they talented people, and that sort of thing. For example, there could be a fact issue in this case: did they or did they not invest enough money in their equipment; that's a fact dispute that was raised here, and yet it wouldn't do me any good to ask you to resolve that dispute because either way it simply had no bearing on what the issue was.

The issue was, when the time came to separate Mr. Stendebach, was the decision made based on his age. Now, it doesn't matter if it was a bad decision. It doesn't matter, in other words, as I have tried to suggest to the

attorneys, and really while much of what we heard was interesting, it wasn't really relevant, because it didn't make any difference if they would sit there and roll dice, if they would throw darts on the wall, if they would flip coins, none of that would make any difference as long as they did not single out people because of their age, and in fact there is a very recent case that came out of the Fifth Circuit, as a matter of fact, came out a week ago, in this very situation of a reduction in force, and the appellate court, by which I am bound, says very clearly that you must understand the duty that this act places on an employer; all it does is tell the employer to make his decisions without regard to age; it does not place a duty on the employer to give any special treatment to people from 40 to 70. It does not make any obligation to treat them any differently, it simply requires the employer to be neutral about age. They can do whatever they want to do. They can fire everybody, they can fire half the people, they can fire them for good reason, for bad reason, it doesn't make any difference, as long as, in this case—I say age, because that's what this case is about; it would also be sex or race, but in this case, as long as age is neutral factor.

So what the Plaintiff had to prove, had to have some evidence of, is that the Defendant was consciously discriminating against him because of his age, that this was actually taken into account, his age, and that this is what affected the decision, it was not a neutral status, and that it affected it, and clearly, as I already explained to the Plaintiff, and I don't necessarily expect he and his attorney to agree with me, and maybe you-all don't, but I have to do my sworn duty, and I simply, in good conscience, could not find any evidence upon which you could base a

decision that the action here was discriminatory based on age. If you look at all of the statistics of who was kept and who was let go and so forth—now, it may not have been the best decision, they may not have had the best people on the committee, they maybe should have looked at old forms, they maybe should have called the people in to visit with them, all of that stuff, but, you see, none of that has anything to do with the case. The case is: were they picking on him because of his age?

Frankly, to summarize, I simply could find no evidence whatever to even allow you to go in and speculate on that. I simply could find no evidence that the Plaintiff presented that this decision was based on age.

Now, some judges are inclined to terminate a jury, see what they do, and hope that you agree with me, and then if you don't, then reverse your decision. I don't think that's right. I think it's a waste of your time. You would have been here all day tomorrow listening to jury arguments, instructions, deliberate for four or five hours, and then if I agree with you, fine, if I don't agree with you, I just reverse your verdict. As I say, to each his own. I don't agree with that procedure. I think I might as well do it up front. There is no way I could let a verdict stand in this case for the Plaintiff. I think there is absolutely no evidence of age discrimination, so I simply am relieving you of that task.

I thank you for being with us.

I will enter a judgment for the Defendant and either side can, of course, appeal and see what happens there, but that's how I see the case, that's my ruling. I have made it, period. I just wanted to take your time to explain to you so you don't have to come back more. The Clerk will compensate you for your time you have put in.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CIVIL ACTION NO. C-78-104

(Filed Sep. 23, 1981)

JAMES L. STENDEBACH,
Plaintiff,

v.

CPC NTERNATIONAL, INC.,
Defendant.

FINAL JUDGMENT

On September 21-22, 1981, this case was presented to a duly empaneled jury. After both parties rested and closed, Defendant renewed its motion for directed motion. Rule 50, Fed. R. Civ. Pr. The Court granted the motion for the reasons stated on the record. It is therefore ORDERED that the Plaintiff, James L. Stendebach, do have and recover nothing from the Defendant, CPC International, Inc. Costs are taxed to the Plaintiff.

DONE at Corpus Christi, Texas, this 23rd day of September, 1981.

/s/ GEORGE P. KAZEN
United States District Judge

APPENDIX C

James L. STENDEBACH,
Plaintiff-Appellant,

v.

CPC INTERNATIONAL, INC.,
Defendant-Appellee.

No. 81-2427

Summary Calendar.

UNITED STATES COURT OF APPEALS
Fifth Circuit.

Nov. 15, 1982.

Managerial supervisor brought action against former employer for termination in violation of Age Discrimination in Employment Act. The United States District Court for the Southern District of Texas, George P. Kazen, J., entered judgment on directed verdict in favor of employer, and supervisor appealed. The Court of Appeals, Politz, Circuit Judge, held that termination of 47-year-old managerial supervisor during plant reorganization did not violate Age Discrimination in Employment Act, even though list containing ages of employees was used during reorganization process, and even though one member of committee determining which employees would be retained stated that someone at corporate headquarters had stated that age might be relevant factor in reorganization effort, where there was no showing that the list was used by committee members nor that contents or existence of the list in any way influenced decisions, and greater precent-

age of employees under age of 40 lost their jobs during the reorganization than did employees between ages of 40 and 70.

Affirmed.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, POLITZ and HIGGINBOTHAM, Circuit Judges.

POLITZ, Circuit Judge:

Fired at the age of 47, James L. Stendebach, a managerial supervisor, invoked the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, against his employer, CPC International, Inc. (CPC). After both sides had rested their case, the district court directed a verdict for defendant. On appeal, Stendebach challenged the directed verdict and various evidentiary rulings. Finding no merit in any error assigned, we affirm.

During the latter part of 1977, the management of CPC, in an effort to revive and save its plant at Corpus Christi, Texas, instituted a plan to reduce and restructure the work force and otherwise effect production economies. The Corpus Christi facility, engaged in the labor intensive corn wet milling business had been in a state of economic extremis for several years. Survival required a dramatic reduction in production costs, by a decrease in the labor force, an increase in unit production or both.

Subject to a general policy outlined by corporate headquarters, the reorganization became the charge of six senior managers in the Corpus Christi facility. Jobs were merged, functions were streamlined, performance mini-

mums were markedly increased. Resulting jobs took on a qualitatively different character. To select those employees who would constitute the reduced labor force, qualified and capable of performing in the new, demanding employment structure, the select committee prepared a list of job qualifications for each of the new positions, together with a comprehensive list of criteria for rating the candidates for each job.

The rating process was the result of both individual and group action. All candidates, including all salaried employees such as Stendebach, considered arguably capable of performing the tasks demanded in new jobs, were individually graded by each of the six committee members who assigned numerical ratings. Thereafter, the committee discussed the ratings and attempted to achieve a consensus. The numbers were tabulated and the candidates with the highest totals got the job assignment.

During the first six months of 1978 the salaried[1] work force was reduced from 76 to 37. Stendebach was one of the 39 terminated. The average age of the salaried work force prior to the reduction was 43.8 years; the average age post-reduction was 45.9 years.

The operation was a success but the patient expired. The gargantuan efforts improved efficiency and reduced production costs but economic conditions were such that the plant could not continue as a viable business entity. By October of 1979, the activity in the Corpus Christi facility was stilled, and all but three of the remaining work force were terminated.

---

1. The employment of many hourly employees was also terminated. Those discharges are not material to the case at bar; the order of their release was dictated by the seniority provisions of the collective bargaining agreement.

[1] To prevail in an age discrimination case, as presented here, a plaintiff must establish that the defendant-employer either refused to consider his retention or relocation because of his age, or else regarded age as a negative factor. *Williams v. General Motors, Inc.*, 656 F.2d 120 (5th Cir. 1981). The directed verdict was grounded on the finding by the district judge that this element of Stendebach's case was wanting.

[2] To uphold this finding we must be persuaded that no reasonable jury could have concluded otherwise. *Hedrick v. Hercules, Inc.*, 658 F.2d 1088 (5th Cir. 1981). The standard in this circuit, against which we measure a directed verdict, was announced in our en banc decision in *Boeing Company v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969):

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury.

Thus charged, we consider the evidence presented "in the light and with all reasonable inferences most favorable

to" Stendebach. The totality of his evidence is composed of: (1) a list containing the ages of employees, (2) the statement by one committee member that someone at corporate headquarters had stated that age might be a relevant factor in the reorganization effort, and (3) an assortment of statistical data. Viewing same in its entirety, we are convinced that this evidence is, at best, a mere scintilla which is insufficient to present a jury question.

Accepting as true that someone in corporate management had told a committee member that age might be relevant, the exhaustive test eventually adopted is devoid of any reference to age. No numerical rating based on age was included. The tests, varied and tailored for the various jobs, and containing as many as 18 criteria, were strictly adhered to by all members of the committee and the final reduction-in-force decisions were based exclusively on the scores received.[2] In this regard we note that the record is devoid of any suggestion that any representative of corporate management attempted to influence the members of the committee in their final decision as to which employees would be retained and which would be released.

Stendebach makes much of a list of employees prepared in October 1977 by Charles Shoemate, a corporate vice-president who had been plant manager in Corpus Christi from February 1974 until June 1976. The hand-written Shoemate list was not prepared in conjunction with the preparation or implementation of the reorganization plan. This list, containing names, ages, years of service, and

2. The system was indirectly weighted in favor of older employees. The general policy directed that if two employees were substantially equal, ties were to be broken in favor of the one with the most seniority with the company.

grade and performance evaluations taken from the latest performance appraisal forms, was prepared for another purpose. There is no evidence that this list was used by the committee members, nor is there evidence that the contents or existence of the list in any way influenced their decisions. There is no evidence that Shoemate was involved in committee deliberations, directly or indirectly, and no suggestion that he was inclined to discriminate against older employees.

The only credible evidence respecting age supports CPC. Upon completion of the committee's efforts, its product was evaluated at corporate headquarters for the express purpose of assuring that the committee had not inadvertently discriminated against older employees.

Plaintiff's evidentiary base is thus reduced to the statistical data offered. We recognize the value of statistical evidence and we have and will dispose of a proper case on that basis. *Harrell v. Northern Electric Company*, 672 F.2d 444 (5th Cir. 1982). But we are cautious in our use of statistics drawn from small samples such as those involved in the instant case. The reason for our hesitance is obvious: "the smaller the sample size, the greater the likelihood that the underrepresentation reflects chance rather than discriminatory practices." *Williams v. Talahassee Motors, Inc.*, 607 F.2d 689, 693 (5th Cir. 1979). *See Mayor of the City of Philadelphia v. Education Equality League*, 415 U.S. 605, 94 S.Ct. 1323, 39 L.Ed.2d 630 (1974).

Thus cautioned, we examine Stendebach's statistical offerings and find them totally unpersuasive of a discriminatory intent by CPC. By the end of 1977, there were 39 employees in the production, technical, and mechani-

cal divisions of the Corpus Christi plant. It was against these workers that Stendebach competed. Of those between the ages of 40 and 70, the group protected by the ADEA, approximately 36% were laid off. Of those under the age of 40, 55% lost their jobs. This reduction effected an increase in the average age of the work force in these departments from 47.06 to 47.35 years of age. And, as earlier noted, after the reduction the average age of the salaried work force increased from 43.8 years to 45.9 years.

[3] We note finally that appellant complains of the admission in evidence of the worksheets used in evaluating the employees. Stendebach maintains that these documents are self-serving and hearsay. The former is inconsequent; the latter is incorrect. The documents were introduced to show the methodology employed by the committee in rating the employees. They were not offered to prove the truth of but merely the fact of their contents. As such, the instruments are not hearsay.

The district court is AFFIRMED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-2427

JAMES L. STENDEBACH,
Plaintiff-Appellant,

versus

CPC INTERNATIONAL INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

---

ON PETITION FOR REHEARING

(January 5, 1983)

Before CLARK, Chief Judge, POLITZ and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ HENRY A. POLITZ
United States Circuit Judge